

CLERK OF COURT
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2007 NOV 21 PM 1:06

ANGELLE PROPERTIES, LLC * 15TH JUDICIAL DISTRICT COURT
VERSUS * DOCKET NO. 2007-5870 "K"
D & D PIPE AND RENTALS, INC. * PARISH OF LAFAYETTE, LOUISIANA

Filed: _____

Deputy Clerk

FIRST AMENDED AND RESTATED PETITION FOR DAMAGES FOR BREACH

NOW INTO COURT, through undersigned counsel, comes Petitioner, Angelle Properties, LLC, and files this First Amended and Restated Petition for Damages for breach of lease agreement against D&D Pipe and Rentals, Inc. setting forth the following:

PARTIES

1.

Petitioner, Angelle Properties, LLC ("Angelle Properties"), is a Louisiana limited liability company domiciled in Lafayette, Louisiana, in the Parish of Lafayette.

2.

Defendant, D & D Pipe and Rentals, Inc. ("D & D Pipe"), is a Louisiana corporation domiciled in Lafayette, Louisiana, in the Parish of Lafayette.

JURISDICTION AND VENUE

3.

Subject matter jurisdiction is proper because the Court maintains subject matter jurisdiction over the dispute based on the object of the demand and the amount in controversy.

4.

Venue is proper in this Court because pursuant to La. Code Civ. Proc. art. 80(A)(3), an action arising from the breach of a lease of immovable property may be brought in the parish where the immovable property is situated or in the parish where the defendant is domiciled. The situs of the immovable property encumbered by the lease is in Lafayette, Louisiana, in the Parish of Lafayette. Additionally, Defendant's domicile address is located in Lafayette, Louisiana, in the Parish of Lafayette.

FACTS AND BACKGROUND

5.

On March 3, 2006, Angelle Properties, as Landlord, and D&D Pipe, as Tenant, executed a Lease Agreement (the "Lease"), whereby D&D Pipe leased the immovable property located at 2450 Southeast Evangeline Throughway, Lafayette, Louisiana, in the Parish of Lafayette. *See* Lease Agreement with Rider No 1 attached *in globo* as Exhibit 1.

6.

Pursuant to the Lease, D&D Pipe agrees to pay Landlord monthly rent in the amount of Five Thousand dollars (\$5,000.00). *See* Exhibit 1 at § 2.1.

7.

The Lease provides for a fixed-term lease, the duration of which is five (5) years, which commenced on March 3, 2006, and accordingly terminates on March 3, 2011. *See* Exhibit 1 at §

3.

8.

Section 10.1 of the Lease provides that

Tenant shall strictly comply with and abide by all applicable environmental laws and regulations which may in any way affect or relate to the Leased Property, or the conduct of Tenant's business and operations on or about the Leased Property. Tenant shall properly label identify, store, package, and dispose of all pollutants, contaminants, solid wastes, petroleum and petroleum product, toxic substances, hazardous wastes, and hazardous substances generated or used by Tenant, or arising out of or in connection with its business and operations on the Leased Property, and shall not cause or suffer the storage of same on the Leased Property except to the extent necessary for the ultimate disposal thereof or as required and permitted in connection with the business and operations permitted under this Lease. Tenant shall not contaminate, pollute, or spill, or permit, cause, or suffer the contamination, pollution, or spill of any such pollutants, contaminants, substances, petroleum or petroleum products, or wastes on or about the Leased Property. Upon surrender of the Leased Property, or a termination, cancellation, or expiration of this Agreement, the Leased Property shall be free from all such pollutants, contaminants, wastes, petroleum and petroleum products, and substances occasioned by Tenant's use and operation of the Leased Property. To the extent not free thereof, Tenant shall at its expense, immediately effect the appropriate clean up, remediation, removal, and disposal of all such pollutants, wastes, contaminants, substances, and petroleum and petroleum wastes.

See Exhibit 1 at § 10.1.

9.

Section 5.1 of the Lease further provides that "Tenant shall operate and maintain the Leased Property in a careful and prudent manner and shall not commit or allow any waste or damage to be committed on any portion of the Leased Property." *See id.* at § 5.1. Pursuant to Section 5.3 of the Lease, D&D Pipe "shall comply with all valid laws, ordinances, rules and regulations made by any governmental authority applicable to the occupancy or use of the Leased Property, including, without limitation thereto, all laws, rules and regulations respecting zoning, safety, fire, and fire hazards." *See id.* at § 5.3.

10.

With respect to insurance obligations of D&D under the Lease, Section 7.3 of the Lease provides, in part,

Tenant shall maintain comprehensive general liability for personal injury, death, pollution or environmental damage, and property damage on the Leased Property ... such insurance shall have minimum liability limits of \$5,000,000 per occurrence, combined single limit, with respect to bodily injury, personal injury, death to any persons, or pollution or environmental damage; and not less than \$5,000,000 per occurrence with respect to property damage, but the amount of such insurance shall not limit Tenant's indemnity obligations pursuant to Section 7.2.

See id. at § 7.3.

11.

Further, with respect to insurance obligations of D&D under the Lease, Section 7.4 of the Lease provides, in part,

Tenant shall keep in full force and effect during the term of this Agreement, at his sole cost and expense, insurance with minimum liability limits of \$5,000,000 on the building and improvements constructed, erected, and/or located on the real estate constituting part of the Lease Property protecting Landlord against all risk of loss to the said building and improvements arising from fire, windstorm, explosion, lightening, flood (if the Leased Property is in a flood zone), vandalism and other similar casualties.

See id. at § 7.4.

12.

D&D Pipe is an oilfield pipe sales and rental company. The business is monitored and regulated by the Louisiana Department of Environmental Quality ("LDEQ") because it has to handle Naturally Occurring Radioactive Material ("NORM") (radioactive particles or radionuclides that occur in nature and, specifically, can occur during oil and gas exploration and production) that becomes concentrated in some oilfield equipment like piping which has to be cleaned for reuse.

13.

D&D Pipe has a NORM license from the LDEQ to store and clean pipe that is at or below certain radiation levels, but they also have to meet regulatory requirements to operate and maintain their facility in a safe manner. The regulatory requirements include, but are not limited to, developing plans for preventing releases, drumming waste carefully, storing waste carefully for limited periods, and manifesting it for off-site disposal or recycling.

14.

Representatives of Angelle Properties visited the leased premises on October 15, 2007. In the course of this access, Angelle Properties discovered that D&D Pipe was in contravention of Section 5.1, 5.3 and 10.1 of the Lease requiring compliance with applicable environmental laws and regulations and to not pollute, contaminate, or otherwise allow waste on the Leased Property. During the site visit, representatives of Angelle Properties noticed that an oil-based and/or petroleum based substance had spilled onto the leased property. *See Exhibit 2, photos taken on property during October 15, 2007 site visit in globo.*

15.

A review of the publicly available records of the Louisiana Department of Environmental Quality ("LDEQ") reveals that an inspection was held by LDEQ on the Leased Property on July 6, 2007 wherein numerous violations of regulations were documented, including unmarked or unlabelled drums containing NORM with radiation levels higher than authorized under law. Further, D&D Pipe and Argo Turboserve Corporation ("ATC") (the owner of D&D Pipe) received a "Notice of Deficiency" from the LDEQ on or about September 20, 2007 giving D&D

Pipe thirty (30) days to respond in writing. *See* Exhibit 3, Letter from LDEQ to ATC dated September 4, 2007 and Inspection Report of July 6, 2007.

16.

D&D Pipe failed to notify Angelle Properties of the violations found during the July 6, 2007 inspection by the LDEQ, nor did they notify Angelle Properties of the formal "Notice of Deficiency" letter from LDEQ.

17.

On October 16, 2007, undersigned counsel sent a formal notice of default pursuant to Section 13.2 of the Lease to D&D Pipe and their respective counsel, Mr. Steven Cohen, via U.S. mail, return receipt requested, demanding that D&D Pipe remedy their default within a reasonable time period. *See* Lease at § 13.2 and see October 16, 2007 "Formal Notice of Default" letter, attached hereto as Exhibit 4.

18.

As of date of the filing of this Petition, D&D Pipe has failed to remedy or cure such default.

19.

Further, at the request of Petitioner, D&D Pipe provided copies of current insurance policies held by D&D Pipe covering the Leased Property, specifically, a Comprehensive Policy issued by Travelers Excess & Surplus Lines Company ("Travelers Policy") and an Umbrella Policy issued by The North River Ins. Co.

20.

A review of the insurance policies shows that the coverage provided does not comply with the requirements contained in Section 7.3 or Section 7.4 of the Lease. In part, Section 7.3 of the Lease requires minimum limits of \$5,000,000.00 per occurrence for pollution or environmental damage. The Travelers policy only provides \$100,000.00 in any one year for pollutant clean-up and removal and does not cover costs to test for monitor or assess pollutants. Further, the pollutants definition under the policy may exclude NORM. Also, the Umbrella Policy ("Umbrella Policy") contains an absolute pollution exclusion.

21.

Pursuant to Section 13.3 of the Lease, Angelle Properties is entitled to, upon Tenant's default, accelerate all rent due under the Lease, and recover all past and future rents due under the Lease, including attorney's fees and court costs. *See* Exhibit 1, Lease at § 13.3.

22.

Further, Section 10 of the Lease provides that D&D Pipe has a duty under the Lease to perform an environmental assessment and clean-up of the property upon termination of the Lease. Specifically,

Within 30 days after the termination of this Agreement, Tenant shall, at its sole cost and expense, cause a Phase I Site Assessment, and if recommended by the Phase I Site Assessor, a Phase II Site Assessment, of the Leased Property (the "Final Inspection") to be performed and completed. Tenant shall at its sole cost and expense, perform any such clean up, remediation, removal, and disposal of all pollutants, contaminants, wastes, substances and petroleum and petroleum wastes, and shall take any other such remedial actions as may be deemed necessary as a result of said Final Inspection to restore the Leased Property to its original condition as of the inception of the Remediation Date."

See Exhibit 1, Lease at § 10.4.

23.

On information and belief, D&D Pipe is going out of business and dissolving the company.

24.

D&D Pipe caused an auction to be held on November 8, 2007 wherein all the inventory of the company was sold, effectively liquidating all assets of the company.

25.

In view of the obligations owed to Angelle Properties by D&D Pipe under the Lease, Plaintiff caused the Original Verified Petition for Injunctive Relief and Issuance of Temporary Restraining Order and Damages for Breach of Lease Agreement and Incorporated Memorandum in Support to be filed on November 2, 2007, seeking an order requiring D&D Pipe to place all auction proceeds into the registry of the Court.

26.

On November 7, 2007, by agreement of the parties and on joint motion to the Court, the Court entered an Order for D&D Pipe to deposit the first \$400,000.00 of proceeds from the auction of inventory of D&D Pipe into an escrow account until such proceeds are to be disbursed by written agreement of the parties or until further order by this Court.

BREACH OF LEASE AGREEMENT

27.

D&D Pipe is in default of the Lease and has breached the Lease by failing to strictly comply with and abide by all applicable environmental laws and regulations in conducting its business or operations on the Leased Property.

28.

D&D Pipe is also in default of the Lease and has breached the Lease by contaminating, polluting, or spilling pollutants, contaminants, substances, petroleum or petroleum products, or wastes on the Leased Property.

29.

D&D Pipe is further in default of the Lease and has breached the Lease by failing to maintain insurance on the property in accordance with the terms and requirements in the Lease.

30.

Angelle Properties has suffered damages resulting from D&D Pipe's breach of the lease.

31.

Under the terms of the Lease, the rent for the term of the Lease has been accelerated and is now due and owing to Angelle Properties by D&D Pipe, along with attorney fees and court costs.

32.

Further, in view of the LDEQ violations and other contamination and pollution on the property, D&D Pipe is obligated under the Lease to clean-up or otherwise remediate the site. Angelle Properties may suffer additional damages if D&D Pipe fails to comply with its obligations under the Lease to clean-up or otherwise remediate the site.

WHEREFORE, Petitioner, Angelle Properties, LLC, prays that after due proceedings that D&D Pipe be found in breach of the Lease Agreement, and that there be judgment entered in favor of Petitioner for all damages, directing that all past, present, and future payments due under the Lease Agreement be immediately payable, enforcing all obligations owed by D&D Pipe to Petitioner under the Lease Agreement, together with attorney's fees and court costs related to these proceedings, and all such other relief as law and equity may require.

Respectfully Submitted,



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**Attorneys for Petitioner, Angelle Properties,
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PLEASE SERVE:
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